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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 298

UNION TRUST COMPANY, *et al.*,
Petitioners,

v.

EASTERN AIR LINES, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR REHEARING

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IN THE

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No. 298

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v.

EASTERN AIR LINES, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR REHEARING

To the Honorable Earl Warren, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States

Your respondent, Eastern Air Lines, Inc., respectfully requests this Honorable Court to reconsider the *per curiam* decision rendered herein on December 5, 1955; and upon such reconsideration (1) to vacate the *per curiam* order, and dismiss the petition for certiorari as improvidently granted; (2) in the alternative, to vacate so much of the order as reversed the judgment below, and place the case on the calendar for briefs and oral argument on the merits; (3) in the further alternative, to remand the cause

to the United States Court of Appeals for the District of Columbia Circuit in order to permit that court to pass upon the several issues which it left undecided, and which were not presented to nor decided by this Court; and (4) in any event that the mandate of this Court be stayed pending final disposition of the matter.[1]

This Rehearing Petition is filed for the following reasons:

(1) The writ was improvidently granted in a non-final judgment case which merely involved its own facts, and which remanded the case for a new trial. There were no "special or important reasons therefor"; no questions of public interest; and no other basis for the exercise of this Court's sound discretion within, or without, Rule 19. In reversing the District Court, the Court of Appeals did *not* make any "inappropriate resolution of conflicting evidence" (*Wilkerson* v. *McCarthy*, 336 U. S. 53, 60) nor did it "reweigh" the evidence (*Tennant* v. *Peoria & P. U. Ry. Co.*, 321 U. S. 29). It merely applied a well settled rule of law in the District of Columbia with respect to testimony concededly negative in form and substance; and finding substantial error, remanded the case for a new trial on the single issue of liability.

(2) On a petition, and brief in opposition, devoted *solely* to whether the Court should *review* an interlocutory, non-final, judgment directing a new trial, this Court took jurisdiction on the merits of the cause and summarily reversed the Court of Appeals, in effect reinstating a jury verdict, without affording

[1] An order extending the time for the filing of this Rehearing Petition up to and including January 25, 1956, was signed by Chief Justice Warren on December 13, 1955.

respondent an opportunity to be heard on the merits. The judgment sought to be reviewed being non-final, the brief in opposition to certiorari entered upon no extended discussion of the merits. Pursuant to the apparent mandate of Rule 24 par. 1 the brief confined itself to "disclosing any matter or ground why the cause should not be reviewed by this court".

(3) This Court, we feel, apparently believed that all issues were before it, but the certiorari petition tendered only a single issue (in three forms, Petition p. 3), viz, whether the Court of Appeals judgment was an unwarranted intrusion upon the jury's province and deprived petitioner of the right of a jury trial. The fact is that there were other important issues presented to the Court of Appeals some of which were passed upon by it, and others not, but none of which have been presented to or passed upon by this Court. These issues were:

(a) The Court of Appeals decided a major Federal question as to the application of the Administrative Procedure Act in a manner contrary to a previous decision of the Court of Appeals for the 9th Circuit. That question has not been, but should be, settled by this Court; but it was not presented to this Court in the certiorari petition.

(b) Eastern's motion to set aside the verdict on the grounds that it was based on passion, prejudice and sympathy for the Bolivian pilot was never passed upon by the Court of Appeals, nor by this Court. The jury verdict exonerated the pilot of the P-38 which *overtook* and struck down, from above and behind a commercial airliner on final approach for landing at the

Washington National Airport in the face of admissions by the Bolivian pilot *that he never saw the Eastern plane.*

(c) Eastern's motion for a new trial on the grounds that the trial of the (non-jury) Tort Claims case simultaneously with, and before the jury in the Eastern case, had resulted in prejudice and deprived Eastern of a fair trial, was never passed upon by the Court of Appeals nor by this Court.

(d) Eastern's motion to set aside the verdict for a new trial on the grounds that the constant repetition throughout the trial of unproven charges that the Government control tower witnesses had consciously "concocted and fabricated their testimony" had created a courtroom atmosphere which deprived it of a fair trial, was never passed upon by the Court of Appeals nor by this Court.

(4) The Court, we believe, inadvertently considered the judgment of the Court of Appeals, as a final judgment of dismissal. This case (No. 298) was not a case of final judgment of dismissal. It was a companion case (with a common record and joint appendix) to Nos. 296 and 297, both of which were final judgment cases under the Tort Claims Act arising out of the same accident, each presenting a single point of law, which was thoroughly briefed by the parties in their respective petitions, and briefs in opposition. In No. 296, the Court granted certiorari and affirmed on the authority of *Indian Towing Co.* v. *U. S.*, 350 U. S. 61, decided Nov. 21, 1955. No. 297 raised the sole question of which state death statute (Virginia

or District of Columbia) was applicable under the Tort Claims Act and the Court denied certiorari. Respondent believes that the close association of this *non-final* judgment case (No. 298) with the *final judgment* Tort Claims Act cases may well have caused this Court to consider the judgment in No. 298 as final.

Statement of the Case on Rehearing

At 11:46 a. m. on November 1, 1949, a clear bright day, an Eastern Air Line DC-4 passenger transport plane, on a regularly scheduled flight, with 51 passengers and a crew of 4 was about to land on runway No. 3 at the Washington National Airport. It was on final approach and 300 feet from the ground when it was struck from *above* and *behind* by a high speed P-38 military plane owned by the government of Bolivia and operated by Eric Rios Bridoux, a Bolivian army pilot. The left propeller of the P-38 cut through the fuselage of the DC-4 just aft of the wings, cutting the DC-4 in two. All aboard the Eastern plane were killed. Bridoux, the only survivor of the disaster, admitted from the witness stand that he was flying by dead reckoning and that the visual obstructions (blind spots) of the P-38 cockpit so limited his vision that he never saw the plane which he struck down. The structural expert of the Civil Aeronautics Board found that the landing gear of the P-38 had crashed through the roof of the DC-4, leaving red paint marks from the belly tanks of the P-38 on the top of the fuselage of the DC-4.

Numerous Tort Claims suits were brought against the Government on the grounds that the air traffic controllers in the airport control tower had failed in their

duty to separate the planes and to advise each of the proximity of the other. Other death actions were brought against Eastern Air Line and Bridoux. The main allegation of negligence against Eastern was a claim that the DC-4 did not follow through in the traffic, or landing pattern of the Washington National Airport. Two cases were selected for trial on the issues of (1) liability and (2) locus of the accident viz., whether the collision occurred in Virginia (death limit $15,000) or in the District of Columbia (recovery for death unlimited). Following *U. S.* v. *Yellow Cab Co.*, 340 U. S. 543 the non-jury Tort Claims Act cases were tried to the District Judge simultaneously with, and in the presence of, the jury to which the cases against Eastern and Bridoux were tried.

In his opening statement to the jury, petitioners' counsel conceded that the Eastern plane had been cleared to land (I-62A, 63A), and no claim that Eastern was landing without clearance was advanced in the pleadings or in the pretrial order (I-21A, 22A). However, after Mr. Dallas W. Rentzel, Administrator of Civil Aeronautics (called as a court witness) testified that a plane "cleared to land" by the tower need not follow through in the landing pattern, but may land immediately, petitioners sought to create an issue of fact as to the existence of a landing clearance by the negative testimony of Lt. Shaw that *he did not hear* the Eastern plane cleared to land. The Washington National Airport landing pattern was admitted into evidence over Eastern's objection and the court charged the jury that it constituted a binding Federal regulation, breach of which would be negligence *per se*. Eastern's objection was based on the undisputed fact that the pattern was

not adopted in conformity with the Administrative Procedure Act, and was never published in the Federal Register.

Answering framed interrogatories the jury exonerated Bridoux, found Eastern liable, and found the collision occurred in the District of Columbia.

Eastern's new trial motion (denied) was based principally on (1) the error in admitting the landing pattern, and the instruction that it was a binding Federal regulation, etc. (2) that the verdict was contrary to the evidence, and based on passion, prejudice and sympathy for the Bolivian pilot (3) that Eastern had been deprived of a fair trial by the repeated (and concededly unproven) charges, made in the jury's presence, that the Government control tower witnesses had consciously "concocted" and "fabricated" their testimony (4) that the trial of the non-jury Tort Claims case, before the jury in the Eastern case, had cast grave prejudice upon Eastern, and deprived it of a fair trial.

In its judgment (221 F. 2d 62) the Court of Appeals ruled (1) that the Landing Pattern constituted a binding Federal regulation notwithstanding failure to follow the adoption procedures specified in the Administrative Procedure Act, 5 U. S. C. 1001 et seq. (2) that because the only testimony adduced by petitioner to prove Eastern was not cleared to land, was the mere *negative* testimony of one, not in a position to hear at all times, that *he did not hear* a landing clearance given, under the local law of the District of Columbia (*Small* v. *Penn. RR*, 80 F. 2d 704) petitioners had not sustained their burden of proof since there was *affirmative, positive*, testimony (whether it

be believed or not) that a landing clearance was given. The Court of Appeals (on a motion to clarify and modify, Appendix A of Petition) affirmed the jury verdict that the locus of the collision was in the District of Columbia, *and remanded the case for a new trial on the issue of liability only.*

I

The writ was improvidently granted in a "non-final" judgment negligence case involving only its own facts, and which merely remanded the cause for a new trial. There were no "special and important reasons therefor" no questions of public interest. Far from depriving petitioners of a jury trial, the judgment below defended such right by ordering a new jury trial. The grant of certiorari was contrary to the standards of certiorari policy and procedure previously announced by this Court.

As far as concerned the law suit against Eastern Air Lines (No. 298) the case was an *ordinary negligence* action against an air carrier arising out of a collision between two airplanes. It involved only its own particular facts. The *per curiam* order of the Court granted certiorari and summarily reversed the Court of Appeals in a case where the reversal below rested solely on whether *under the local law of the District of Columbia* there was sufficient evidence to take to the jury the issue whether the Eastern Air Lines' plane in its approach for landing at the Washington National Airport was attempting to land without clearance or permission from the control tower.

It is a patent fact, on the face of a clear record, that none of the "Questions Presented" (Petition pp. 2-3) as set forth in the Petition for Certiorari is, in fact, presented by the record; and the brief in opposition so stated. (Brief in opposition, p. 2)

While No. 298 was closely related to Nos. 296 and 297, both by a common fact situation and the same Joint Appendix, No. 298 was a simple negligence case, with *none* of the special and important questions as to the applicability of the Tort Claims Act, or as to what state law is applicable under that Act, which were presented in Nos. 296 and 297. It was, indeed, unfortunate for this respondent, that its case was tied to No. 296 and No. 297, by a common Joint Appendix. In its non-final judgment, remanding the case for a new trial, the Court of Appeals in No. 298 did not base its reversal on any federal question (although it did decide a federal question in favor of petitioners, viz., the landing pattern, contrary to the Ninth Circuit in *Hotch* v. *U. S.*, 212 Fed. 2nd 280); nor was its decision remanding the case in conflict with any decision of this Court, nor of any other Court of Appeals. It merely decided a "matter purely of local law" in the District of Columbia, *D. of C.* v. *Pace*, 320 U. S. 698, 702; *Griffin* v. *U. S.*, 336 U. S. 704, 717-718.

The certiorari petition (pp. 2-3) tendered, as a reason for review by this Court, a single question, whether the judgment of the Court of Appeals "constituted an unwarranted intrusion into the jury's exclusive province and a deprivation of the constitutional right to a jury trial". Although presented in three different forms (Petition p. 3), this was the

single question urged, as appears from page 5 of t
petition where it is stated:

> "This petition is largely grounded on the nec
> sity of this Court's exercising its supervis
> jurisdiction to avoid emasculation of the c
> stitutional right to jury trial under the guise
> appellate review as to the legal sufficiency of t
> evidence where that review usurps the jur
> sole prerogative of evaluating questions of cre
> bility and the relative weight and force of c
> flicting evidence and inferences."

Respondent's brief in opposition met that propo
tion by pointing out that in truth and in fact t
Court of Appeals did not, as petitioners erroneou
asserted, pass upon questions of credibility, or c
flicting testimony; nor did it, as the petition repeate
asserts, hold that the jury was required to acce
"the version of the control tower operator as a matt
of law". The opinion of the Court of Appeals mer
applied a rule of law, well settled in the District
Columbia and in other jurisdictions,[2] to the effect th

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[2] *Seregos* v. *C. W. Good Inc.*, 3rd Cir., 1952, 193 F. 2d 741
Small v. *Pennsylvania R. Co.*, 1935, 65 App. D. C. 1
80 F. 2d 704;
Strider v. *Pennsylvania R. Co.*, 6 Cir., 1932, 60 F. 2d 237
Venchik v. *Pennsylvania R. Co.*, 1941, 143 Pa. Super. 4
18 A. 2d 118;
Lanier v. *Missouri P. R. Co.*, 1929, 9 La. App. 586, 119
710;
Zotter v. *Lehigh Valley R. Co.*, 1924, 280 Pa. 14, 124 A. 2
Jensen v. *Oregon Short Line R. Co.*, 1922, 59 Utah 367,
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Rickert v. *Union P. R. Co.*, 1916, 100 Neb. 304, 160 N. W.
Young v. *Erie R. Co.*, 1913, 158 App. Div. 14, 143 N. Y.
176;
Jordan v. *Osborne*, 1911, 147 Wis. 623, 133 N. W. 32;
Hubbard v. *Boston & A. R. Co.*, 1893, 159 Mass. 320, 34 N.
459.

if there be positive, affirmative, evidence that a sound or signal was made or given, then mere *negative* testimony by a witness that he did not hear such sound or signal has little or no probative value if it appears that the witness was not at all times in a position to hear, or that he was not at all times attentive. We analyze the Court of Appeals holding in further detail under Point III *infra*.

That is the sole and simple import of the judgment of the Court of Appeals reversing this jury verdict. The Court of Appeals did not make any "inappropriate resolution of conflicting testimony", an appellate practice identified and condemned in Mr. Justice Black's opinion in the FELA case, *Wilkerson* v. *McCarthy*, 336 U. S. 53, 60. The certiorari petition, by repeated distortions of the Court of Appeals holding, sought, we believe, to convey to this Court the impression that the Court of Appeals had made an "inappropriate resolution of conflicting testimony", and based thereon had rejected the jury verdict, and granted judgment n.o.v. to defendant. Indeed the whole petition was written as though the Court of Appeals judgment had been a *final judgment of dismissal*, depriving petitioners of their right of trial by jury—as though the Court of Appeals ruled as a matter of law that the jury "must accept" the testimony of the control tower operator (Petition pp. 3, 4, 5, 6, etc.).

The heading on page 12 of the petition that the Court of Appeals' decision "is a shocking invasion of the jury's function, a gross impairment of the right to trial by jury and contrary to standards for judicial review long established by this Court" is

such an obvious distortion of the record that respondent felt it unnecessary to deal with it in its brief in opposition. It seemed so clear as to require no more than a single line of comment, since the judgment sought to be reviewed was a non-final interlocutory remand for a new jury trial (leaving numerous other issues undecided). Later herein the Court's attention will be directed in detail to the petition's misstatements of the record, and to the issues which the decision of the Court of Appeals, and the order of this Court, leave undecided.

It is the settled practice of this court *not* to grant certiorari in non-final judgment cases, unless (in addition to "the special and important reasons therefor") there are extraordinary and exceptional circumstances requiring it for the further conduct of the case.

> *American Construction Co.* v. *Jacksonville T & K R. Co.*, 148 U. S. 372, 384;
> *The Conquerer*, 166 U. S. 110, 113;
> *U. S.* v. *Gen. Motors*, 323 U. S. 373, 377;
> *Land* v. *Dollar*, 330 U. S. 731, 734;
> *Larson* v. *Domestic & Foreign Corp.*, 337 U. S. 682, 685.

Respondent has not been able to find any civil jury case in which this Court, after an opposing brief had been filed, granted certiorari and simultaneously reversed a non-final judgment which had merely reversed a jury verdict and ordered a new trial. *Thibaut* v. *Car & General Ins. Corp.*, 332 U. S. 751 might *appear* to be such a case, but there *no brief in opposition* to the petition was filed; and even in that case this Court granted a rehearing and dismissed the writ as improvidently granted, 332 U. S. 828.

We carefully distinguish the case at bar from FELA, Jones Act, and similar cases in which, (a) after a jury verdict for the plaintiff, the District Court or the Court of Appeals had *set aside the verdict and given judgment for the defendant as a matter of law*; or (b) dismissed the complaint for failure to state a claim and entered judgment for defendant. In some such cases this Court has granted certiorari and simultaneously reversed upon the certiorari petition; sometimes with, and sometimes without, a brief in opposition.[3] In each such case, however, the Court was dealing with a *final* judgment. In each it could be soundly argued that the dismissal *as a matter of law* had constituted an "invasion of the jury's function" (just as the petition in the case at bar argued).

That situation did not exist in No. 298, and respondent relied upon the well settled rule of the certiorari policy and procedure, that this Court would not review a non-final judgment unless there are excep-

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[3] In *Cantey* v. *McLain Line*, 114 F. 2d 1017, the Second Circuit Court of Appeals affirmed the dismissal of a libel brought under the Jones Act, on grounds that libellant was not a member of the crew of a vessel—a final judgment. This Court granted certiorari and simultaneously reversed in a *per curiam* order, 312 U. S. 667. *Respondent appeared* in opposition to the certiorari petition.

In *Rogers* v. *U. S. Lines*, 205 F. 2d 57, the Court of Appeals for the Third Circuit affirmed the district court's judgment granting the vessel owner judgment n.o.v. in a longshoreman's suit—a final judgment. This Court granted certiorari and simultaneously reversed in a *per curiam* order, 347 U. S. 984, citing its earlier decision in *Alaska SS Co.* v. *Peterson*, 347 U. S. 396. *Respondent appeared in opposition.*

In *Gianfala* v. *Texas Company*, 222 F. 2d 382 the Court of Appeals for the 5th Circuit set aside a jury verdict and dismissed the complaint on the grounds that, as a matter of law, plaintiff was not a seaman under the Jones Act. This Court granted certiorari and simultaneously reversed in a *per curiam* order, 350 U. S. 879. *Respondent did not appear.*

In *Lillie* v. *Thompson*, 162 F. 2d 716, an FELA case, the

tional and extraordinary circumstances, which are not presented here—especially a case which involved only its own particular facts, and where the judgment left several litigated issues undecided.

Based upon these decided cases and upon the rules of this Court it has, we believe, been the understanding of text writers, and of the bar, that certiorari would not be granted in a non-final judgment case of the character of that at bar. See, e. g., Stern & Gressman, Supreme Court Practice, Second Edition, 1954, p. 130; Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States, 1951, Section 130; Hart & Wechsler, The Federal Courts and the Federal System, 1953, p. 1394.

Even if this case otherwise qualified for certiorari, its posture, when the petition for certiorari was filed,

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Sixth Circuit Court of Appeals affirmed the dismissal of a complaint for failure to state a cause of action under the Act—a final judgment. This Court granted certiorari and simultaneously reversed in a *per curiam* decision, 332 U. S. 459. *Respondent did not appear.*

In the following FELA cases the *per curiam* orders granting certiorari, and simultaneously reversing, were all in *final judgment* cases, where a jury verdict for plaintiff had been set aside and judgment directed for the railroad:

Smalls v. *Atlantic Coast Line R. Co.*, 216 F. 2d 842 (4th Cir.), 348 U. S. 946—no appearance for respondent. Mr. Justice Reed, Mr. Justice Burton and Mr. Justice Minton dissented. Rehearing denied, 349 U. S. 907.

Anderson v. *Atlantic Coast Line R. Co.*, 221 F. 2d 548 (5th Cir.), 350 U. S. 807 (No. 143 Oct. Term 1955). Respondent appeared. Mr. Justice Reed, Mr. Justice Frankfurter, Mr. Justice Burton and Mr. Justice Harlan were of the view that certiorari should not be granted. Rehearing denied, 350 U. S. 905.

Cahill v. *N. Y. N. H. & H. R. Co.*, 224 F. 2d 637 (2nd Cir.), 350 U. S. 898. Respondent appeared. Mr. Justice Frankfurter, Mr. Justice Burton and Mr. Justice Harlan were of the view that certiorari should have been denied. Mr.

was one in which it was clearly "not appropriate for adjudication" *Rice* v. *Sioux City Cemetery*, 349 U. S. 70, 79; *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U. S. 387, 393. The Court of Appeals had merely ruled that under the settled law of the District of Columbia (citing *Small* v. *Penn. R. R. Co.*, 80 F. 2d 704) petitioners had failed to sustain the burden of proof on one important issue. It, therefore, remanded the case for a new trial in order to permit petitioners to sustain that burden if it could. Clearly, therefore, the case was not "ripe for adjudication" by this court. Although *Rice* v. *Sioux City Cemetery*, 349 U. S. 70, dealt with a federal question, the language of this court's opinion is peculiarly apposite:

> "A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly con-

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Justice Reed was of like view, and dissented from the judgment of reversal. Rehearing denied on January 9, 1956.

Strickland v. *Seaboard Air Line R. Co.* (No. 425 Oct. Term 1955), 80 So. 2d 914 (Sup. Ct. Florida), 350 U. S. 893. Respondent appeared. Certiorari granted and judgment unanimously reversed in a *per curiam* order on authority of *Bailey* v. *Central Vermont R. Co.*, 319 U. S. 350.

The following cases were not FELA, nor Jones Act, but both were *final judgment* cases in which the jury verdict for plaintiff had been set aside, and judgment directed for defendant:

Williams v. *Carolina Life Ins. Co.*, 210 F. 2d 477 (5th Cir.). Suit on an accident policy. Certiorari granted and simultaneously reversed 348 U. S. 802. Unanimous court. No appearance for respondent. Rehearing denied, 348 U. S. 889.

Swafford v. *Atlantic Coast Line R. Co.* (No. 261 Oct. Term 1955), 220 F. 2d 901 (5th Cir.). Grade crossing accident. Certiorari granted and simultaneously reversed, 350 U. S. 807 in the same *per curiam* order as the FELA case, *Anderson* v. *Atl. Coast Line R. Co.*, 350 U. S. 807. Mr. Justice Reed, Mr. Justice Frankfurter, Mr. Justice Harlan felt that certiorari should not granted. Rehearing denied, 350 U. S. 898.

sidered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. (*Magnum Import Co.* v. *Coty*, 262 U. S. 159, 163; see also Address of Mr. Chief Justice Vinson, before the American Bar Association, Sept. 7, 1949, 69 Sup. Ct. v, vi; Address of Mr. Chief Justice Hughes, before the American Law Institute, May 10, 1934, XI Proc. Am. Law Inst. 313.) 'Special and important reasons' imply a reach to a problem beyond the academic or the episodic." (p. 74)

"Moreover, the evident difficulties of the case suggest that, in the absence of compelling reason, we should not risk inconclusive and divisive disposition of a case when time may further illumine or completely outmode the issues in dispute." (p. 77)

We respectfully submit that for the reasons stated, the rule of *Wilkerson* v. *McCarthy*, 336 U. S. 53 is not applicable to the case at bar; and that this Court should follow its decision in *Thibaut* v. *Car & General Ins. Corp.*, 332 U. S. 828; grant rehearing, vacate the order entered herein on December 5, 1955, and dismiss the writ as improvidently granted.

II

The petition for certiorari and brief in opposition were devoted solely to the preliminary question whether this Court should review the judgment below. The summary reversal of the judgment, simultaneous with the granting of certiorari, has operated to deprive respondent of an opportunity to be heard on the merits.

Although the petition for certiorari was written as though the court below had granted judgment n. o. v. to respondent[4] neither in its "Questions Presented", in its "Reasons for Granting the Writ", nor in its "Conclusion" did the petition for certiorari pray for a summary reversal of the non-final judgment of the Court of Appeals. Fairly read, the sole contention of the petition was that this Court should exercise its supervisory jurisdiction and grant review in a case in which, petitioners claimed, the *remand* for a new trial amounted to a deprivation of its right of trial by jury. Turning to the brief in opposition filed by respondent, the attention of the Court is first directed to the fact that Rule 24, paragraph 1 prescribes "an opposing brief disclosing any matter or ground why

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4 Every case cited in the petition as authority for the proposition that the ruling below was an invasion of plaintiff's right of trial by jury is either an affirmance of a jury verdict, or a case in which the Court of Appeals reversed a jury verdict, and dismissed, or granted judgment n.o.v. See *Jacob* v. *The City of New York*, 315 U. S. 752; *Tennant* v. *Peoria & Pekin Union R. Co.*, 321 U. S. 29; *Lavender* v. *Kurn*, 327 U. S. 645 and *Myers* v. *Pittsburgh Coal Co.*, 233 U. S. 184 cited on pages 13-15 of the certiorari petition. The latter were cases in which the Court of Appeals reversed the jury verdict and dismissed the complaint.

the cause *should not be reviewed by this court*. See Rule 19" (our italics). Rule 19 is entitled "CONSIDERATIONS GOVERNING REVIEW ON CERTIORARI". Because the arguments of the petition were all devoted to the contention that this Court should review the case, and following the apparent mandate of Rule 24, paragraph 1, respondent's brief in opposition confined itself to the letter of Rule 24. It expressly refrained from arguing the merits of the cause, and devoted its arguments solely to the question of whether on this non-final judgment of remand, a proper case for the granting of certiorari under Rule 19 was made out. There are numerous expressions of the Court on that subject. In this regard the brief in opposition was guided by the admonitions of the late Chief Justice Hughes in his letter of March 21, 1937, to Senator Burton K. Wheeler; as well as by the remarks of the late Chief Justice Vinson in his address on the "Work of the Federal Courts" to the American Bar Association on September 7, 1949; as well as by the views of the numerous text writers who have admonished that respondent's counsel should remember that he is seeking to induce the Court to deny a petition for certiorari, not to win a case on the merits.

The brief in opposition called the Court's attention specifically to the fact that petitioners' statement of the case was replete with factual inaccuracies and inferences without support in the record (Brief in Op. p. 3). Having done so, the opposing brief pointed out that those inaccuracies did not have any bearing on the single issue presented, viz., whether this Court should review a non-final judgment of the Court of Appeals remanding the case for a new jury trial.

However, since the Court entered its *per curiam* order on the petition as filed, the inaccuracies contained therein are dealt with at length later herein.

Based solely on such a petition, and brief in opposition, and without benefit of oral argument or briefing on the merits, this Court granted certiorari and, simultaneously therewith, summarily reversed the judgment of the Court of Appeals.

Respondent respectfully urges this Court to reconsider its *per curiam* order of December 5, 1955; and upon such reconsideration to vacate such order and dismiss the writ as improvidently granted. In any event, respondent earnestly urges upon the Court that the manner in which the merits of this case were decided has operated to deprive respondent of a most fundamental right, to wit, the opportunity to be heard on the merits, and upon the other issues expressly left undecided by the Court of Appeals, and not presented to this Court. If the writ of certiorari is not to be dismissed as improvidently granted, the *per curiam* order should be modified so as to vacate so much thereof as reverses the judgment of the Court of Appeals, and the cause restored to the calendar of this Court for briefs and oral argument on the merits of all issues.

III

In reaching its *per curiam* decision we believe this Court may have been misled by the numerous misstatements in the petition as to the rulings of the Court of Appeals and as to the evidence. Petitioners' statement of the case misstated the record in many particulars.

(a)

Misstatements as to the Ruling of the Court of Appeals

The following are quotations from the petition in which the rulings of the Court of Appeals are misstated:

> "* * * the court below concluded that the trial judge erred * * * in not accepting the version of the control tower operator as a matter of law, * * *" (p. 3)

> "whether * * * an appellate court can * * * direct the jury as a matter of law to accept the version of" a witness (Tigner) (p. 3)

> "The court below *assumed* Tigner's credibility (and that the jury was *required* to believe him)" (p. 6)

> "* * * the court has in effect ruled as a matter of law that Tigner told the truth * * * and that the jury was *required* to accept that statement as truth." (pp. 16-17)

> "* * * an appellate court here (the court below) states that as a matter of law he (Shaw) must have been mistaken." (p. 18)

"The Court of Appeals Erroneously Concluded That the Jury Must Accept the Uncontradicted Testimony of A Witness * * *" (p. 21, heading)

"* * * the court below held that the jury was bound to accept Tigner's word, that a jury is required to believe the uncontradicted assertion of an interested witness * * *" (p. 21)

Each of these quoted statements is untrue. Each is so patently untrue that individual pinpointing did not seem necessary, nor appropriate, in the brief in opposition.

A mere reading of the opinion of the Court of Appeals (221 F. 2d 62) demonstrates the untruth of each statement. That court did *not* rule on any question of the *credibility* or *veracity* of Tigner, or any other witness. It did *not* rule that *"the jury must accept"* the testimony of Tigner or any other witness. It did *not apply, nor* even *mention,* the "uncontradicted testimony rule" to which pages 21 through 26 of the petition devote a detailed discussion. If the Court of Appeals had reversed and granted judgment n.o.v. those statements would, on this record, be proper and true. However where the Court of Appeals, for the reasons it has stated, has remanded for a new jury trial, such assertions are obvious distortions of the record.

We respectfully ask this Court to consider for a moment exactly what the Court of Appeals decided in the judgment below (apart from its ruling in favor of petitioners that the larding pattern constituted a binding Federal Regulation notwithstanding the contrary view of the Ninth Circuit in *Hotch* v.

U. S., 212 F. 2d 280): In order to establish, *prima facie,* that the Eastern plane in its landing approach left the Washington National Airport traffic pattern without control tower authority, and thus became *per se* negligent by violating a Federal Regulation, petitioners had to prove that the Eastern DC-4 had *not* been *cleared to land* by the tower (because the District Judge instructed the jury as a matter of law that a plane "cleared to land" was authorized to leave the traffic pattern and land immediately). Petioners had the burden of proof. In its effort to prove the tower had given no landing clearance, petitioners presented Lt. Shaw, the co-pilot of a National Airline plane which was some minutes behind the Eastern plane, who testified that while tuned to the tower frequency, *he did not hear* Eastern cleared to land. The parties had *stipulated* in the pre-trial order (I-22A) that the Eastern plane's radio was tuned to the tower frequency (119.1 megacycles) as early as 11:38 a. m. Lt. Shaw conceded his plane did not get on that frequency until 11:42 or 11:43 a. m. Thus if the clearance was given in the 4 or 5 minutes between 11:38 and 11:42-11:43 Shaw could not have heard it.

It is a conceded fact that when Shaw's plane transmitted to the tower on its radio, its reception was muted, and the landing clearance, if given to Eastern during that time, could not be heard (I-111A, 112A; II-249A).

It was a conceded fact that Lt. Shaw (although he said he had earphones on during the critical 3 or 4 minute period) was *not operating the radio, nor responsible for its operation. He was flying the airplane.* His pilot, Captain Porter, was handling the

radio. Shaw was engaged in the all consuming task, and manifold duties, of bringing a large commercial transport plane into one of the busiest airports in the world.

Shaw's testimony as to the landing clearance was concededly negative in form—that he did not hear Eastern cleared to land (I-92A).

Opposed to Shaw's testimony was (1) The repeated statements by the control tower operator, Tigner, that he, personally, had cleared Eastern to land; and that the Eastern plane was exactly where it should have been when it was struck by the Bolivian (2) Captain Ator's unequivocal statement that, while waiting for permission to take off on the runway then in use, he was *told by the tower* that he "could take position behind the landing DC-4" which he had already heard make radio contact, (V-885-A) and (3) the wealth of testimony by Colonel McGovern and many others (hereinafter referred to) that the Eastern plane was making a *normal routine landing.*

It has been the settled law in the District of Columbia, at least since 1935, when *Small* v. *Pennsylvania R. Co.,* 80 F. 2d 704 was decided, that if there be *affirmative* evidence that a sound was made, or a signal given, mere *negative* evidence that a witness did not hear the sound or signal is not sufficient to sustain the burden of proof, and raise a jury question, unless it *also* appears that the negative testimony witness was in a position to hear at all material times, and his attention was not distracted. The same rule exists in the Third and Sixth Circuits, *Strider* v. *Penn. R. Co.,* 6th Cir., 60 F. 2d 237; *Seregos* v. *C. W. Good Inc.,* 3rd Cir., 193 F. 2d 741; and in

some seven states (See cases cited in the opinion belo
221 F 2d 62, 72). *That rule was not disputed by t*
petitioners in the Court of Appeals.

Such being the applicable local law, all the court b
low did was to make such analysis of the evidence
was necessary to determine whether that well esta
lished rule applied to Shaw's testimony, the latt
being concededly negative in form and substance.

In so doing the court below did *not* rule, as t
petition erroneously states, on Tigner's *credibility*
veracity. It did *not* rule that the jury had to acce
Tigner's testimony. It did *not* "reweigh the ev
dence" as was done in *Tennant* v. *Peoria & P. V. R*
Co., 321 U. S. 29. It made no independent resol
tion of conflicting testimony as was done in *Wilke*
son v. *McCarthy,* 336 U. S. 53, 55. All it did was ru
that Tigner's testimony was *affirmative* and *positi*
(regardless of whether it is believed); that Shaw's te
timony was *negative;* that because Shaw's radio wa
not tuned to the tower frequency the whole tim
because his radio could not hear tower transmissio
while it was transmitting on the same frequency
because Shaw had no responsibility for the radi
but was occupied with the manifold duties of flyi
the plane, his mere negative testimony did not sustai
the burden of proof on that issue.

The court therefore remanded the case for a ne
trial to give petitioners another opportunity to me
that burden, if they could.

Thus we say that the petition misstated the actio
and ruling of the Court of Appeals. This Cour
we believe, may have been misled by those misstat

ments. Re-hearing should be granted. The *per curiam* order should be vacated, and the writ dismissed as improvidently granted.

(b)

Misstatements as to the Evidence

The following are quotations from the Petition for Certiorari in which the evidence is misstated:

Statement in Petition:

> "* * * petitioners claimed that Eastern was concurrently responsible for the crash by reason of several acts of negligence by its pilots including *inter alia*, attempting to land without clearance from the Control Tower. (See pre-trial order IR. 21-26; see also jury charge at XR. 2107 et seq.)" (p. 4)

Neither the complaint nor the pre-trial order (I-21-26A) contains such a charge of negligence nor did petitioners' counsel make such a claim. In fact, on at least three occasions during his opening statement, petitioners' counsel declared that respondent's plane had been *cleared to land*. (I-62A, 63A) Additionally, in the case against the United States, the Trial Court, in holding that the Government was negligent, *found as a fact* that respondent's plane was *cleared to land*. (I-44A)

Statement in Petition:

> "[3] There was not one scintilla of evidence corroborating Tigner's story that he cleared Eastern. None of the other men in the control tower could

> confirm Tigner as to the alleged clearance (VII R. 1562, VIII R. 1575, 1549) although they were not very busy at the time. (VII R. 1394, 1409) and, strangely enough, claim to have heard the other alleged transmissions between Tigner and the P-38." (p. 6, footnote 3)

The testimony of two of the tower operators corroborated Tigner. Mr. Davis testified (VII-1562A) that he heard Tigner tell the P-38 (on the military frequency which could not be heard by Eastern) to make a 360 degree turn to his left and follow the DC-4 ahead and below him. Mr. Union (VIII-1615A) likewise heard Tigner give the same instruction. Clearance to land to Eastern was a routine matter. The initial instructions to the P-38 became emergency orders when the P-38 failed to follow them. This fact is corroborated by Sgt. Buckwalter, control tower operator at Bolling Field, who overheard part of the Washington Tower-P-38 communications. (V-902A, 906A).

The testimony of Captain Ator, a Senior Pilot with American Airlines (V-884A) fully corroborated Tigner. His plane was located at the end of the landing runway awaiting clearance to take off (V-884A). Captain Ator testified:

> "A. And he [Captain Anderson, the other pilot of the American Airlines' plane] had called for instructions, which we always do, and we were informed that we could take position behind the landing DC-4 which we had already heard contact in there, and there was an Eastern that was coming in, in fact, I believe ground control informed us that it was behind an Eastern DC-4.

"Q. In other words, you were to take off behind an Eastern DC-4? A. That is right." (V-885A)

Captain Ator further testified that the Eastern DC-4 was lined up with the runway and coming directly in (V-886A) and at the time of the collision was approximately at an altitude of 300 feet. (V-886A)

Additional corroborative evidence arises from the physical facts of the accident. Many witnesses establish without contradiction that the DC-4 was on final approach for Runway 3 and was coming in for a *normal routine landing.* It was stipulated by the parties that the Eastern DC-4 was on final approach for landing on Runway 3 (I-21A) when it was struck by the P-38; from above and behind. (Ihrig, II-292A, 293A, 299A, 300A, 307A; McGovern, II-356A, 357A, 358A, diagram 358A; Mindel, III-480A, 481A, statement 485A; Cope, IV-713A; Union, IV-730A, 731A, 746A, 753A, 754A, VIII-1631A, 1640A; Ator, V-886A; Pahl, V-1008A, 1012A; Lowery, VI-1157A, 1164A, 1165A; Tigner, VI-1287A, 1313A; Aubin, IX-1793A) There is also the testimony of many witnesses who, from vantage points in the Potomac yards, the Mount Vernon Memorial Highway, or in that vicinity, which gave them excellent points of observation and whose years of experience gave them a peculiar knowledge and education in the manner in which planes approach Runway 3 for landing. Each of these witnesses, without contradiction, testified that the DC-4 was making a normal approach for landing, using as their guide (except in the case of Mr. Mindel, who is an aircraft expert and who also so testified) the fact that

they had seen many other planes previously making exactly such an approach. (Mindel, III-480A; Tesh, VIII-1748A, 1749A; Lowery, VI-1161A; Heislup, VI-1207A; Green, VI-1130A, 1131A; Ihrig, II-306A; Williams, VI-1244A; Hester, VI-1098A)

Additionally, Colonel Marshall McGovern, a Senior Pilot in the United States Air Force with vast flying experience testified (II-350A) that the DC-4 was making a normal air transport approach to Runway 3. Colonel McGovern had a clear view of the DC-4's approach from an excellent vantage point at Bolling Field, which is directly across the Potomac River from Washington National Airport. (II-350A, 351A) The Colonel testified, *inter alia*:

> "Q. Colonel, when you first saw the DC-4 plane, will you tell us whether or not it was making a normal approach to the airport similar to one that you had observed planes making on many occasions prior to this occasion? A. From my observation or my point of observation, the Eastern C-54 [DC-4] made a normal airline approach." (II-358A)

Statement in Petition:

> "That company frequency (like any other frequency) is in effect a party line and transmissions thereon can only be heard by planes tuned to that party line. * * * and ATC then directs the plane to switch over to the control tower, whereupon the plane again rotates its radio selector switch in order to cut in on the separate and distinct radio channel or party line for communication

with the control tower (119.1 megacycles)". (pp. 7-8)

The party line telephone analogy is deceptive. It is a conceded fact that while a plane is transmitting on a given frequency, it cannot receive (hear) a transmission from the tower on the same frequency. (I-112A, II-249A) It is hardly necessary to note that such a condition does not exist on a party line telephone. Speaking into a party line telephone (transmitting) does not mute its reception.

Statement in Petition:

"* * * the Shaw testimony is impressively different from that purportedly summarized in the opinion below." (p. 8)

The fact is that the Court of Appeals fairly summarized Shaw's testimony. Petitioner's treatment of Shaw's testimony on page 8 of the petition conveniently omits all reference to *time*. Lt. Shaw fixed the time his plane was over Beltsville and first tuned the tower at 11:41-42 a.m. (I-81 to 84A). The parties solemnly stipulated in the pre-trial order that the Eastern plane was over Beltsville and switched to tower frequency at 11:38 a.m. (I-22A)—about 3 or 4 minutes earlier than Shaw. The stipulation was solidly grounded on the documentary evidence (See Eastern Ex. 9, the time records, XI-2161A-3 as explained by Roerig's testimony at IX-1915A).

Statement in Petition:

"Shaw's testimony continued to show unequivocably: (1) that from the time the Eastern DC-4 and his plane first switched to the tower fre-

quency, Shaw's plane continued to be tuned to that frequency (I R. 85, 90, 92, 99, 117, 140); * * *" (pp. 8-9)

That statement is incorrect. It is flatly refuted by (1) Shaw's own testimony that he was not tuned to tower frequency until 11:41-11:42, and (2) by the stipulated and documentary fact that Eastern was tuned to tower frequency at 11:38.

Statement in Petition:

"(5) That there was nothing to distract Shaw's attentiveness to radio messages (such as log entries to make (I R. 124));" (p. 9)

That statement is demonstrably incorrect. Shaw was *flying the airplane*—operating the controls—bringing her in for a landing—occupied with the manifold duties and responsibilities which such an engrossing task entailed. It was his colleague, Capt. Porter, who was handling the radio, and thus charged with the duty of listening and petitioners did not call him as a witness. To say that there was "nothing to distract Shaw's attentiveness" is little short of the fantastic. Shaw did not so testify. When asked about a transmission from the tower he admitted he heard something which did not "register". The petition (p. 9) incompletely quoted his answer to this question. His entire answer shows he was "inattentive" rather than "attentive". It was:

"And they said 'Eastern, traffic, a P-38'. And at that point he gave them a direction; *but the direction didn't register.*" (I-90A our emphasis)

On that same page of the record Lt. Shaw emphasized his inattentiveness:

> "I didn't hear—I do not recollect if Eastern acknowledged for the traffic or not. It doesn't stick in my mind." (I-90A)

Statement in Petition:

> "7 The court below supported its argument largely on the basis of time discrepancies. * * * the only factor showing possible error in that regard is the pre-trial stipulation between counsel that Eastern was cleared into the pattern at 11:37 whereas Shaw indicated it was about 11:41-1143. * * * is Shaw not to be believed because counsel may have blundered in making a pre-trial stipulation prior to a full exploration of the facts?" (p. 10, footnote 7)

In respect of this statement it should first be said that the court below made no "argument". It merely tested Shaw's *negative testimony* by the rule of *Small* v. *Penn. R. R. Co.,* 80 F. 2d 704, to determine if he was at all times in a position to hear. In so doing, a comparison of the time as testified by Shaw, with those stipulated by the parties, was the only rational basis for determining whether Shaw could tell the *whole* story. The time discrepancies immediately demonstrated that he could not.

Petitioners intimate that they "blundered" into the stipulation that Eastern was cleared into the traffic pattern at 11:37-11:38 a.m. There was no blunder. Petitioners had taken thousands of pages of testimony and knew the precise facts before that stipulation was entered into. Petitioners also knew the

documentary fact set forth in Eastern Ex. 9 (XI-2161A-3) that the company time record (made *ante litem motam*) (showed that the Eastern plane switched to the tower at 11:38 a.m. when it was over Beltsville.

Appendix B of the petition purports to set forth a minute analysis of Tigner's testimony. We have checked it carefully, point by point, against the record and we find it inaccurate in many particulars with which we need not now burden the Court. Even if accurate, such a tabulated comparison would have been helpful only if the Court of Appeals had passed upon the *credibility* and *veracity* of the witnesses and the *weight* of the evidence and granted judgment to Eastern; but such was not the case here. As pointed out above the only purpose of the examination of the evidence by the Court of Appeals in the judgment below was to test Shaw's negative testimony by the rule of *Small* v. *Penn. R. R.*, 80 F. 2d 704. The only characterization of the Tigner testimony made by the Court of Appeals is that it was *affirmative* and *positive*. It seems unnecessary therefore to deal in detail with the numerous misstatements contained in Appendix B to the petition.

IV

The writ was improvidently granted for the further reason that, in view of the new trial ordered, the Court of Appeals judgment expressly left major issues undecided. It did not pass upon other grounds for a new trial urged by Eastern. As to such issues the *per curiam* order of reversal has the effect of depriving respondent of its statutory right of appeal from the judgment of the District Court.

In the judgment below the Court of Appeals decided three points on Eastern's appeal. The opinion reported in 221 F. 2d 62 records two of those points viz, (1) that although not published in the Federal Register, the Washington National Airport landing pattern is a binding Federal regulation, breach of which constitutes negligence *per se* (221 F. 2d 68-69); and (2) that Lt. Shaw's negative testimony that he *did not hear* Eastern cleared to land over his radio frequency, was not sufficient (in the face of the control tower operator's corroborated testimony that he issued a clearance to Eastern) to sustain petitioners' burden of proving that Eastern was *not* cleared to land. The *third* point decided was an affirmance of the jury finding that the locus of the collision was in the District of Columbia. The decision on the latter point is recorded in a subsequent order, entered on petitioners' motion to modify and clarify, and is printed in Appendix A to the petition.[5]

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[5] See the Court of Appeals order of June 24, 1955, restricting the new trial to the issue of liability, printed at pages 4a-5a of Appendix A to Petition.

See the memorandum of July 12, 1955, on Eastern's motion for rehearing of petitioners' motion to clarify or modify at pp. 5a-6a of Appendix A to Petition.

One of the *most vital contentions* urged upon the trial court and vigorously pressed in the Court of Appeals was that (independent of the three points decided) Eastern's motion for a new trial should have been granted because:

(a) The verdict was contrary to the law and the evidence, and was based on passion, prejudice, and sympathy for the Bolivian pilot. The exoneration of the Bolivian in the face of his own admissions, and the irrefutable physical facts, demonstrates the strange character of the verdict, and shows that it was based on passion, prejudice and sympathy.

Respondent argued below, and repeats here that it is impossible to reconcile the verdict of the jury with the facts, and the reasonable inferences afforded by the record. If ever a verdict was grotesque and unnatural, this one was. The jury *exonerated* the P-38 which overtook and struck down an airliner on final approach for a landing, killing 55 persons, passengers and crew; and it held the airliner liable!

The verdict exonerating Bridoux was grotesque and unnatural on its face because on his own testimony and the undisputed physical facts Bridoux's actions resulted in the death of 55 innocent persons. Bridoux testified that when he turned from base leg to final (II-431A), about four and a half miles from the airport, and at an altitude of 1100 to 1200 feet (II-433A) *he could not see* anything on the ground *nearer* to him than a point two miles south of the airport (II-444A; III-553A). Thus at 1200 feet he could not see anything on the ground for two and a half miles ahead of him. This was because the P-38 was so constructed as to limit the visibility in front and below (II-441A,

442A). He also testified he was anxious to land because of trouble with his right engine (III-523A). *He was in a hurry* (III-545A). He came in a straight descent to land on Runway 3 and did not dip his nose or tip his wings to obtain better visibility (III-557A). The collision was at the stipulated altitude of 300 feet, and it was not more than a mile from the end of the runway. Now, if at an altitude of 1100 to 1200 feet his visibility in front and below was obscured for two and a half miles, his visibility at the collision altitude of 300 can be readily computed (III-556). The angle of visibility is a constant (the structure of the cockpit), and the area of obstructed vision is reduced in direct proportion to the reduction in altitude (III-556). Thus if the area of obscured vision is two and a half miles at 1100 feet, at 300 feet altitude it is 3600 feet.

Whether these mathematics be correct within a margin of 100 or 1000 feet is of no particular moment. They do demonstrate that on his own admissions, the Bolivian pilot with a faulty engine, was hurrying into the airstrip for a landing, and was operating his plane in such a manner that he was unable to see ahead and below for a distance of 3600 feet. He could have corrected this visual limitation if he dipped his wings or otherwise changed the attitude of his plane and he did not do so (III-556A; X-2003A, 2004A). His excuse that it was not permitted (X-2004A, 2014A) is patently erroneous. No provision of the Civil Air Regulations sustains it. On the contrary it is "careless and reckless operation of a plane" where there is "lack of vigilance by the pilot to observe and avoid other air traffic" [60.12(c)]; and a "pilot must clear his position prior to starting any maneuver, either on

the ground or in flight". All planes as well as automobiles have "blind spots"—some greater than others. The court took judicial notice of that fact in *Kuhn* v. *C. A. B.*, 87 U. S. App. D. C. 130, 134, 183 F. 2d 839, 843 (D. C. Cir. 1950), and held it to be the duty of the pilot to so maneuver his plane as to compensate for these "visual deficiencies".

Indeed Section 3.382 of the Civil Air Regulations (as it then stood, 14 C. F. R. 3.382) required the pilot compartment of civilian aircraft to be so arranged as to "afford the pilot a sufficiently extensive, clear, and undistorted view for the safe operation of the airplane," and the P-38 (a military aircraft) admittedly was in violation of that Civil Air Regulation. Additionally, the plane was required to have a certificate of airworthiness (49 U. S. C. A. 560), and did not have it (III-532A).

By Bridoux' own testimony his speed at the instant of impact was 150 miles per hour. The *stipulated* speed of the DC-4 was 130 miles per hour. Bridoux admitted to a rate of descent of 500 feet per minute (II-427A). There is a substantial body of evidence that his rate of descent was considerably greater but that need not be discussed here. The conceded physical fact introduced by the petitioners' witness Pahl is that the landing gear of the P-38 crashed through the top of the DC-4 exerting tremendous downward force on the top of the transport plane (V-1012A, 1013A, 1014A).

Accordingly, accepting Bridoux' testimony at its face value, we have a military type aircraft approaching one of the busiest airports in the world, at almost high noon on a clear November day at a

speed of 150 miles per hour at a high rate of descent, with the pilot unable to see ahead and below him for a distance of 3600 feet. Such a verdict shocks the conscience of any reasonable person. This jury actually exonerated a pilot who flew the military plane, head on, into a large passenger transport liner, striking it from above and behind, resulting in the death of 55 people, without ever having seen the plane which he hit (II-440A).

It is inconceivable that a jury could exonerate a pilot in the face of such undisputed testimony, and his own admissions, unless they were moved by passion, prejudice and sympathy, which, we submit, is just what did move them. The Bolivian's testimony from the witness stand as to how, crushed and injured, he escaped from the cockpit of his doomed plane at the bottom of the river, was a moving and dramatic courtroom scene (II-440A to 450A), but when all of the testimony is fully analyzed, no reasonably fair-minded person could possibly exonerate Bridoux from liability for this disaster.

This ground for a new trial was not passed upon by the Court of Appeals, nor by this court.

(b) The next ground for a new trial was that the trial of the Tort Claims Act (non-jury) cases simultaneous with, and before the jury which sat in the cases against Eastern (while *theoretically* permissible under *U. S.* v. *Yellow Cab*, 340 U. S. 543 and agreed to by all parties) in practical operation worked a great injustice upon the corporate respondent, and deprived it of the elementary requisites of fair trial.

(i) The *first* illustration of practical prejudice to Eastern was the unproved charges of conscious "concoction" and "fabrication" repeatedly made in the jury's presence against the testimony of the Government witnesses. Eastern's captain and crew were dead—killed as a result of this collision—and this grim fact placed Eastern's case in the hands of the two other actors in the disaster, viz., Bridoux and the tower personnel. Bridoux never saw Eastern and consequently gave no testimony with respect to it. The only evidence existing as to communication *between Eastern and the control tower* (aside from fragments overheard by Lt. Shaw) was from the mouths of the tower personnel. There were no other living witnesses. Eastern was compelled to rely on their testimony, or to offer no testimony. Bridoux could not testify as to the tower's instruction to Eastern because (being on a different frequency) he did not hear the transmissions. Lt. Shaw could not give the whole story because he was not on that frequency (119.1 megacycles) at all times and could testify only to what he heard while he was on that frequency and listening. In the nature of the situation, therefore, that whole area of the case dealing with communication between the DC-4 and the tower, was uncontradicted, and was also confirmed by the actions of the Eastern plane in response to it. From the very day of the accident, these tower witnesses had unanimously exonerated Eastern of all blame in written statements. (Tigner statement, Eastern Ex. 5, XI-2160A; Union statement, Plaintiffs' Ex. 28, XI-2158A.) Obviously, therefore, unless petitioners could inject confusion, prejudice, passion, and bias into the picture, the uncontradictable testimony of the tower witnesses would entitle Eastern to a verdict.

The method adopted was to destroy those witnesses; to charge, openly, before the jury that the testimony of all tower witnesses was collusive; that it had been "fabricated and concocted"; that the flight strips were "doctored"; and to promise that affirmative evidence in support of these charges would be later adduced. When the trial closed no such evidence had been offered. The Trial Court, of course, so instructed the jury in its charge (X-2092A, 2093A), but the harm had been done.

The charges were first made during Bridoux' cross-examination of Tigner, the Government employed air traffic controller, whose uncontradicted testimony was that the DC-4 had followed his instruction to the letter, and that he had cleared it to land. At a bench conference counsel for Bridoux and for petitioners told the court that the testimony of Tigner and the other men in the tower "is concocted and was concocted on November 1" (VI-1340A, 1341A); that the flight strips (tower records of departure and arrival of planes) were deliberately "doctored" (VI-1339A). Thereafter Tigner was cross-examined at length (VII-1399A to 1408A) on his written statement (Eastern Ex. 5, XI-2160A), and counsel stated in the presence of the jury that he would produce evidence to show that there was coordination among the tower witnesses in the preparation of their statements (VII-1401A). A systematic attempt was made, by suggestive questions, to convey to the jury, the impression that the tower men had met and coordinated with Civil Aeronautics Administration officials for the purpose of agreeing on a story, but it elicited only denials from the witness (VII-1402 to 1408A), and the court directed counsel to discontinue that line of interroga-

tion (VII-1408A). However counsel returned to it again and again (VII-1528 to 1531A, 1538A). He again assured the court *in the presence of the jury* that he was prepared to offer proof of conscious fabrication (VII-1529A) but he refused to furnish the names of the witnesses (VII-1535A), and the court pointed out the serious prejudice to Eastern (VII-1533A). The bench colloquy at VII-1535 to 1537A is particularly significant. Here again "the questions and not the answers were what the petitioners thought important. The purpose of the question clearly was to keep persistently before the jury, the assumption of damaging facts which could not be proven * * *" *People* v. *Mullings*, 83 Cal. 138, 23 Pac. 229 (1890).

About at this point the Trial Court, sensitive to the courtroom atmosphere, commenced to realize the harm being done to Eastern by these repeated charges, and after excusing the jury, stated "It is very serious from the standpoint of Eastern Air Lines" (VII-1533A). These charges, theretofore confined to the written statements, had been imperceptibly transformed into accusations that the whole testimony of the witnesses on the stand had been collusively fabricated.

But the systematic effort to prejudice Eastern did not stop here. During the testimony of Donovan Davis, another tower operator, cross-examination on the written statements was resumed (VIII-1581 to 1583A), and the charge of "concoction and fabrication" again aired, this time by counsel for Bridoux (VIII-1580 to 1583A), who was forced to admit that he had no evidence to support his charge, except what he hoped to elicit by cross-examination (VIII-1584A).

At this point the trial court, fearful of the effect upon the jury, stopped further interrogation. The bench colloquy at VIII-1583 to 1585A reveals the court room atmosphere.

But the reiteration of these unproved charges did not stop there. When Robert Union, another tower controller, was under cross-examination (although he had previously been called as petitioners' witness, IV-723 to 764A), he was sharply attacked with charges of concoction and fabrication and in the presence of the jury petitioners' counsel states "It is the contention of the plaintiff that C. A. A. got all the tower men together and each told what they knew, and they then started preparing statements to blend their stories" (VIII-1632A). There then ensued a colloquy in which the words "fabricate", "fabrication", "conspiracy" and "influence" were freely employed (VIII-1633A, 1634A). Counsel then withdrew his charge of "a specific intent to falsify" in favor of "the influence of other people * * * in the preparation of the statement" (VIII-1634A). Cross-examination on the latter point likewise came to naught (VIII-1634 to 1637A).

The situation reached its climax, late in the trial. On the cross-examination of Clarence Stock, Chief of Airways Operation Division, C. A. A., petitioners' counsel advised the court (out of the presence of the jury) "* * * I still will not say that there is anything intentionally done wrong * * *" (IX-1847A). However he returned to the charge of concoction and fabrication on the testimony of Rydstrom (a former tower operator), the last witness who testified before the case went to the jury (X-2059 to 2073A).

The examination of that witness was unparalleled in this long and hard-fought trial. Eastern had no part in it. The attention of the court is especially directed to the colloquy and the court's examination of this witness at X-2064 to 2075A, all of which took place in the presence of the jury, with the issue of "fabrication" again stated by the court at X-2067A. Rydstrom was an unfortunate young man who had just been discharged from Perry Point Veterans Hospital where he was treated for severe accidental physical injuries, and manic depressive psychosis (X-2081A, 2082A). He made a written statement of the accident which was absolutely his own, from beginning to end (X-2070A), but he thought Stock had made some suggestions to the point of impact, etc. (X-2079A, 2080A), but "Mr. Stock did not pick out the point. It was a general mulling over" (X-2080A).

The prejudice of these repeated episodes led the Trial Court during the testimony of Rydstrom to say to petitioners' counsel:

> "You are prejudicing the case of Eastern and Bridoux"
>
> * * * *
>
> "You have left the inference to be drawn that the statements which are merely collateral for use for impeachment, you have left the inference that the witness' testimony of the circumstances are fabrications and concoctions." (X-2076A)

and to warn the jury and repeat:

> "I will inhibit any further inquiry on this.
>
> Members of the jury, this concerns only the plaintiff and the United States. It doesn't in-

clude the plaintiff and the other defendants." (X-2080A)

* * * *

"In other words, I want to make it absolutely clear to you, members of the jury, that as far as you are concerned, you are not concerned with his testimony at all. It is for the benefit of the Court in relation to the case of the plaintiff against the United States." (X-2082A)

Confronted by the continued and persistent repetition of unsupported charges throughout the long trial, Eastern moved, at the close of all the evidence, to strike from the record (as to it) all statements of counsel pertaining to fabrication, concoction and conspiracy (X-2083A, 2084A), and further moved to strike all statements of counsel as to the similarity between the statements of the tower operators. These motions were denied (X-2084A).

In its charge, after nine weeks of trial, and the testimony of 48 witnesses, the Trial Court sought to remove from the minds of the jury what it recognized as prejudice engendered by these repeated charges (X-2092A, 2093A). The jury was told that these charges "like Banquo's ghost", have "been recurring in the course of this trial"; that although counsel first claimed the written statements were fabricated, and concocted (X-2092A), that charge had been withdrawn (X-2092A, 2093A) and the jury was instructed to "dispel that from your minds, because counsel have said that there is no charge of fabrication and concoction or subornation of perjury, if you will, in this case." (X-2092A, 2093A).

The crippling prejudice created by these repeated charges in the long trial could not be neutralized or

removed by a few words in the course of a long instruction, particularly *after nine weeks of trial.* The atmosphere of passion and prejudice engendered by them became too fixed. It deprived respondent of a fair trial, *New York Central* v. *Johnson,* 279 U. S. 310 (1928); *Throckmorton* v. *Holt,* 180 U. S. 552, 567 (1900); *Hockaday* v. *Red Line,* 85 U. S. App. D. C. 1, 174 F. 2d 154 (D. C. Cir. 1949); *Knuckles* v. *Weathersby,* 63 U. S. App. D. C. 276, 277, 72 F. 2d 69, 70 (D. C. Cir. 1934); *Zinkhan* v. *D. of C.,* 50 U. S. App. D. C. 312, 314, 271 Fed. 542, 544 (D. C. Cir. 1921); *Knickerbocker Trust Co.* v. *Evans,* 188 Fed. 549, 567 (1st Cir. 1911); *Jas. Stewart & Co.* v. *Newby,* 266 Fed. 287, 295 (4th Cir. 1920); *Middleton* v. *U. S.,* 49 F. 2d 538, 540 (8th Cir. 1931); *Maytag* v. *Cummins,* 260 Fed. 74, 82-83 (8th Cir. 1919).

(ii) The second illustration of practical prejudice to Eastern is the fact that the jury heard all the evidence adduced against the government in the non-jury, Tort Claims, case. There were many good *theoretical* reasons for trying the non-jury cases against the U. S. and the jury case against Eastern, together. The cases involved the same accident, and a large area of identical fact. *U. S.* v. *Yellow Cab,* 340 U. S. 543 (1951) had removed the procedural difficulties and undoubtedly considerations of economy suggest that the cases be tried together. That is why the parties consented to this consolidated trial. But their consent was to the traditional "fair trial" which is assured to all litigants, not to the kind of a trial which this one turned out to be. The case at bar is a perfect example of a situation in which jury and non-jury cases should *not* be tried together. The trial court so remarked (VI-1289A).

We believe we have shown above the unsuccessful effort of the Trial Judge to remove the blot of "fabrication and concoction" from the jury's mind, and his ruling (in which petitioners acquiesced) that it had nothing to do with Eastern (X-2080A, 2082A). But all of the evidence adduced by the petitioners in support of their case against the United States was heard by this jury. Great segments of the evidence had no materiality or relevancy whatever in respect of petitioners' case against Eastern. Petitioners' case against the United States was a sharp and bitter assault on the operation of the control tower, and upon the honesty and integrity of the air traffic controllers. Indeed in his opening statement petitioners' counsel promised the court and jury that he would show that the tower personnel was so careless and inattentive to their duties that they cleared two planes to land upon the same runway at the same time (I-63A, 64A), and that is exactly what petitioners set out to do. Now if the tower did clear two planes to land on the same runway at the same time obviously that fact should have exonerated Eastern. Those same tower witnesses (the only witnesses in a position to implicate Eastern) exonerated Eastern from all blame, and testimony in this respect was uncontradicted. However, every shred of evidence adduced by the petitioners to establish its case against the Government was heard by the jury. Every witness was seen by the jury. The repeated exchanges between petitioners' and Government counsel all took place in the presence of the jury. The innumerable bench conferences requested by petitioners' counsel or Government counsel on matters exclusively pertaining to their own case could not but have influenced the jury in a manner and to a degree which cannot be measured.

Glen Tigner was on the witness stand for four solid days. During a long and bitter cross-examination there were repeated episodes of acrimony between counsel. The same was true, though to a lesser degree, during the examination of the other tower witnesses, Davis, Union and Seltzer; and also during the examination of Stock. As far as respondent Eastern is concerned neither Tigner, nor any other tower witness had any motive whatsoever, other than the truth, for exonerating Eastern. *As a matter of fact the control tower operators could have exonerated the Government by placing the blame on Eastern.* It necessarily follows from the verdict that the jury disbelieved the tower witnesses to the extent that their testimony was in conflict with that of Bridoux. There was no warrant in the evidence for disbelieving them on the transmissions to the DC-4 because (1) that testimony was uncontradicted, and corroborated, and (2) there was no other evidence upon which Eastern could be held liable.

Thus we say that Eastern, an innocent party in the bitter controversy between petitioners and the United States, was gravely prejudiced by the unanticipated course which this trial took; and that all fault which petitioners charged against the Government witnesses was unconsciously imputed by the jury to Eastern.

* * * *

By statute (28 U. S. C. 1291) and rule (Rule 73 F. R. C. P.) respondent was given the right of appeal to the Court of Appeals from the District Court's denial (I-54A, 55A) of its motion for a new trial on the grounds last specified (I-53A). That right was preserved to respondent when the Court of Appeals granted a new trial on other grounds. In so doing

the Court of Appeals remarked that it was unnecessary to decide the other grounds urged (See 221 F. 2d 62, 73; and see memorandum at pp. 5a-6a, Appendix A of Petition). On remand the District Court would have been free to decide all issues not disposed of by the Court of Appeals. *Dean Milk Co.* v. *Madison,* 340 U. S. 349, 356; *Northern Pac. Ry. Co.* v. *Concannon,* 239 U. S. 382, 387; *Christoffel* v. *U. S.,* 214 F. 2nd 265, cert. den. 348 U. S. 850. The *per curiam* order of this Court, wholly reversing this non-final judgment, has the effect of depriving respondent of its statutory right of appeal on these specific grounds.

As a minimum of relief to respondent in this extraordinary situation, it is respectfully submitted that if the writ is not to be dismissed as improvidently granted, the case should be remanded to the Court of Appeals for decision on those points expressly left undecided by the Court of Appeals. As Mr. Justice Black said in his dissenting opinion in *Ryan Stevedoring Co.* v. *Pan-Atlantic S. S. Corp.,* 350 U. S. 231 at page 250:

> "Surely before this Court determines the existence of a contract and the scope of its coverage the case should be sent back to the trial court so that these issues could be determined after a full hearing on the facts. The issues were not tried in the District Court and not tried in the Court of Appeals. The issues have never been tried. In *American Stevedores, Inc.* v. *Porello,* 330 U. S. 446, we remanded a case to the trial court for a hearing on evidence as to the scope of a contract of indemnity even though it was written."

V

The *per curiam* order should be vacated for the further reason that the Court of Appeals erroneously decided, and this Court did not review, a major issue of law under the Federal Administrative Procedure Act; and because its decision in this regard is in conflict with a decision of the Court of Appeals for the Ninth Circuit.

Overruling respondent's contention, both the District Court and the Court of Appeals decided that the Washington National Airport landing pattern, although not adopted in accordance with the rule making processes specified in the Administrative Procedure Act, (60 Stat. 277, 5 U. S. C. A. sections 1001 (c), 1002 (a) (3), 1003) and never published in the Federal Register, nevertheless constituted a binding Federal regulation, breach of which would be negligence *per se* (See 221 F. 2d 62, 65, 68-69). In so holding the Court of Appeals decided a question of great public interest, viz, that a purported Federal Regulation, not adopted in the manner specified by the Administrative Procedure Act, nevertheless has existence and validity, if one has knowledge of it. Respondent did not cross petition for certiorari to review that ruling (or indeed any ruling of the Court of Appeals) because the judgment merely remanded the case for a new trial. Such questions would become proper for review by this Court only after they had ripened into a final judgment.

In ruling on this point the Court of Appeals expressly declined to follow (See 221 F. 2d 62, 69) a contrary decision of identical character, by the

Ninth Circuit. The latter case was *Hotch* v. *U. S.* 212 F. 2d 280. There Hotch was convicted of violating a Department of the Interior regulation closing the waters of Taku Inlet to commercial fishing. His conviction was affirmed by the Court of Appeals for the Ninth Circuit, 208 F. 2d 244, but on rehearing Hotch claimed for the first time that the purported regulation never came into existence because it had not been published in the Federal Register. On such rehearing the conviction was reversed 208 F. 2d 249. On re-rehearing the court adhered to its decision of reversal, 212 F. 2d 280.

The effect of the Court's *per curiam* decision of December 5, 1955 on this major and far reaching question of law is indeterminate. The order reverses the judgment of the Court of Appeals without expression of the reason therefor. If such reversal is to be taken as reversing the judgment *in toto,* then the Court of Appeals ruling on the landing pattern is reversed, and this Court's order of reversal means that the District Court erred in admitting it into evidence. The necessary effect is a reversible error requiring a new trial.

On the other hand if the *per curiam* of December 5th was *not* intended to reverse the judgment of the Court of Appeals as to the validity of the purported Federal regulation, then respondent has been deprived of the opportunity to seek review in this Court of a major federal question, of universal importance under the Administrative Precedure Act, decided by the Court of Appeals in a manner flatly contrary to another circuit.

Conclusion

The *per curiam* order of December 5, 1955, granted certiorari and simultaneously reversed a non-final judgment of the Court of Appeals which involved only its own facts, and which remanded the case for a new trial, leaving several major issues undecided. It is respectfully submitted that the writ was improvidently granted. Rehearing should be granted, and upon such rehearing the *per curiam* order of December 5, 1955, should be vacated and the writ dismissed as improvidently granted. Alternatively so much of the order as reversed the judgment below should be vacated, and the case should be placed on the calendar of this Court for briefs and oral argument on the merits of all issues. As a further alternative, the order of December 5, 1955, should be modified so as to remand the cause to the United States Court of Appeals for the District of Columbia to permit that Court to pass upon the several issues left undecided.

Respectfully submitted,

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Certificate

I hereby certify that this petition is presented in good faith and not for purposes of delay; and I further certify that copies of this petition have been served upon counsel for the petitioners by delivering the same to their office 1001—15th St., N. W., Washington, D. C., this 24th day of January, 1956.

RICHARD W. GALIHER
Richard W. Galiher